Neutral Citation Number: [2020] EWHC 106 (QB)

Appeal ref: QA-2019-000313

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE OXFORD COUNTY COURT
ORDER OF RECORDER RIZA QC DATED 9 OCTOBER 2019
COUNTY COURT CASE NO E75YX847
APPEAL REF: QA-2019-000313

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

McALPINE GRANT ILCO LIMITED	**Claimant and Appellant**
- and –	
AFR REFRIGERATION LIMITED	**Defendant and Respondent**

- -
- -

Henry Morton Jack (instructed by **Keoghs LLP**) for the **Appellant**
James Newman (instructed by **Stone Rose Brewer LLP**) for the **Respondent**

Hearing date: 22 January 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE GRIFFITHS

Mr Justice Griffiths :

1. This is an appeal from a judgment of Mr Recorder Riza QC in the Oxford County Court after a trial. The Recorder by order dated 9 October 2019 dismissed the Claimant's claim for damages and ordered the Claimant to pay the costs. The basis upon which he did so was that the damages claimed were too remote to be recoverable. Permission to appeal to this court was granted by Stewart J. I will refer to the Appellant/Claimant as "the Claimant" and to the Respondent/Defendant as "the Defendant".

2. The action arose out of the sale of a refrigeration unit ("the Unit") by the Defendant to the Claimant in March 2015. The Claimant within days sold it on to a third party, installing it as well as supplying it to the third party ("AMS") on 20 March 2015. AMS used the Unit for the refrigeration of high-value pharmaceutical products. Friday 23 May 2015 was the last working day before the long weekend ending with the Bank Holiday on Monday 26 May 2015. When AMS reopened on Tuesday 27 May 2015, it found that the Unit had failed over the long weekend. The rise in temperature had caused damage to the pharmaceutical products inside. There was unchallenged evidence from the Claimant that the products had to be discarded by AMS, the temperature having risen to 25 degrees Celsius, when it should have been 4 degrees Celsius (Eric White, witness statement paras 4 and 6, not cross examined).

3. On 16 February 2016, AMS sent the Claimant a letter before action claiming (according the Claimant's Particulars of Claim) damages in respect of the pharmaceutical products in the sum of £28,960.82; associated staff costs of £3,503.94; interest in the sum of £1,889.89 and continuing at a rate of £7.19 per day; and legal costs, which a later letter put at £7,037.31 including VAT. These sums (excluding the continuing interest) come to a total of £41,391.96. On 5 August 2016, the Claimant settled with AMS for £36,000 inclusive of costs.

4. The Claimant then brought the present action against the Defendant, in which it claimed the £36,000 paid to AMS, a further £1,406.40 incurred by the Claimant by way of loss adjuster's fees in defending the AMS claim, and statutory interest. This is the claim (totalling £37,406.40 excluding interest) dismissed in its entirety by Recorder Riza QC after the trial.

Issues

5. The Appellant's Notice raises three grounds of appeal:-

   i) The judge erred in law by posing the question "What is the evidence about the nature of the loss that the parties must be taken to have contemplated in the event of a breach in this case?" (in paragraph 35 of his judgment).

   ii) The judge erred in law by confusing two separate questions, namely "What is a naturally arising loss?" and "What steps could be taken to prevent that loss?".

   iii) "If, contrary to ground two, it is appropriate to ask whether a loss could have been prevented in deciding whether or not it was naturally arising, the judge erred in his answer to that question in any event. He found that, had an alarm been connected, the loss would have been prevented and therefore it did not

arise naturally. There was no evidence on this point, however, and the proposition is not self-evident. The answer to the question would depend on a large number of factors about which there was no evidence (i.e. availability of personnel to deal with the alarm when triggered, the availability of alternative refrigeration and so on)."

6. The Respondent's Notice asks for the judge's order to be upheld on the following different or additional grounds (as well as, in the alternative, seeking to uphold the judge's findings as made):-

   i) "The learned judge erred in finding that the loss in question arose under limb 1 of the rule in *Hadley v Baxendale* (1854) 9 Exch 341. Having found that the Unit was used to store high value goods, the unit could be connected to an external system for a minimal sum, and despite being advised to install the alarm AMS [to whom the Claimant sold the Unit after buying it from the Defendant] failed to heed the advice, the learned judge should then have found that the Unit was being put to special use (something out of the ordinary), that is, storing high value goods without utilising the alarm system. It is to be considered fair and reasonable that people take reasonable measures to protect goods of a high value. The learned judge should have found that because the Unit was not being used in the ordinary course of things because it was being put to a special use, limb 2 of *Hadley v Baxendale* applied. On the basis of the findings at paragraphs 35 and 40 [of the judgment] the claim should remain dismissed."

Procedural history

7. The Claim Form was issued on 9 August 2018 accompanied by Particulars of Claim. The Defence was dated 20 February 2019. Directions were given on 21 February 2019, including directions for standard disclosure, the exchange of witness statements of fact and directions for expert evidence. A trial was ordered with an estimated length of 2 days in a window beginning on 2 September 2019.

8. The trial took place on 26 September 2019. I do not have a transcript of the proceedings but Counsel before me on both sides also appeared below and there was no disagreement about the key elements of the trial which took place in the course of what turned out to be a one-day hearing.

9. The issues were narrowed at the trial. In particular, the Defendant conceded (in the light of the evidence, including expert evidence) two things which had not been conceded on the pleadings:

   i) It was conceded that the Unit sold by the Defendant to the Claimant was defective and in breach of the warranty in section 14 of the Sale of Goods Act 1979 that it should be of satisfactory quality. Therefore, liability was no longer in issue and the only issues were in relation to quantum, the Defendant contending, and the judge agreeing, that none of the damages claimed by the Defendant were recoverable.

   ii) It was conceded that, subject to the Defendant's arguments on causation and remoteness of damage, the Claimant's quantum of damages, based upon the

> settlement with AMS and its associated costs, was agreed. This meant that nothing turned on the fact that the Claimant was not claiming for losses to its own products but for losses claimed against the Claimant by AMS, and authorities such as *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 15077 (TCC) and *Contigroup Companies Inc v Glencore AG* [2004] EWHC 2750 (Comm) were not considered by the judge, although the first two had been cited to him before the concession.

10. This left only the issues of causation and remoteness to be determined by the judge. He formulated those issues in paragraphs 8-9 of his judgment as follows:-

> "At trial, C and D [i.e. the Claimant and the Defendant] agreed that the main issue for the court is whether or not the damage was too remote.
>
> D's case is that notwithstanding the breach he is not liable for the loss because it is too remote and/or that there was a supervening event in that AMS failed to install an alarm or a monitoring system despite having been advised to do so by C. In other words C should not have settled the case."

11. At the trial, the Claimant relied on three witnesses of fact. Two of these, Eric White and Gavin Tapping, who were both engineers employed by the Claimant, were not cross examined. The third, Roger Grant, a director of the Claimant, was cross-examined. The Defendant relied on just one witness of fact, Rudolph Reginiano, a director and shareholder of the Defendant, who was also cross examined.

12. The expert reports were not agreed, but the experts (both engineers) were not required to give evidence and were not cross examined. The Claimant's expert, Mark Philips, provided a report dated 26 April 2019. The Defendant's expert, John Robinson, provided a report dated 2 July 2019 and on 8 August 2019 responded to questions from the Claimant arising out of his report. The engineers then agreed a joint statement signed by them on 27 and 29 August 2019 respectively.

13. At the end of the one-day trial, the judge reserved his judgment. He then distributed by email a written judgment dated 3 October 2019. After receiving an application for permission to appeal, he refused permission with reasons which expanded upon his judgment.

The basis of this appeal

14. This was a relatively low-value claim (the agreed quantum, if recoverable at all, totalling £37,406.40 excluding interest). The approved costs budgets exceeded the value of the claim (the Claimant's approved costs budget being £47,483 and the Defendant's approved costs budget being £34,750).

15. Further costs will have been incurred by both sides in the course of this appeal.

16. Both sides (as appears from the Appellant's Notice and Respondent's Notice quoted above) challenged aspects of the judgment and it is right to say that it does not always

fully explain its reasoning, particularly when stating findings of fact. Only four paragraphs of the 44-paragraph judgment refer to any witnesses of fact by name. None of the expert evidence is specifically referred to at all. The Claimant in this appeal challenges the judgment, while the Defendant's skeleton argument defends it as "concise" and argues that the judge was entitled to form the conclusion that he did, although "the approach taken by the judge in coming to this conclusion may not have been the conventional one." However, in view of the need to limit further costs, both sides joined in asking me to bring the case to an end by my decision on this appeal, one way or the other, and not to refer the case back, either for further explanation, or for further findings or for reconsideration of any or all of the issues in the case, even if the judge turns out to have asked himself the wrong question or questions (as both sides, in different ways, suggested he did). This I will do, mindful of my powers under CPR 52.20 and CPR 52.21(4) and with the agreement of the parties.

The test for recoverable damages in this case

17. The first question is what test applied to the assessment of recoverable damages in this case.

18. The judge began his consideration of this by quoting an extract from the first sentence of the classic two-limb test formulated by Alderson B in *Hadley v Baxendale* (1854) 9 Exch 341, (1854) 156 ER 145, 152 which is in the following terms:-

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

19. However, the judge correctly recognised (and the parties agreed) that the test applicable to the case before him, which was based upon a breach of warranty under section 14 of the Sale of Goods Act 1979, was the test in section 53 of the Sale of Goods Act itself (judgment paragraphs 24 and 32) which he described as forming part of "a comprehensive statutory code" (judgment paragraph 27). Within section 53, and for reasons which he explained, the judge decided that only section 53(2), and not section 53(3), was applicable to the situation in the case before him, and there is no appeal against that conclusion (judgment paragraphs 32 and 33).

20. Section 53(2) of the Sale of Goods Act 1979 ("the Act") provides:-

> "**53. Remedy for breach of warranty**
>
> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

The decision of the judge on recoverable damages

21. In the section of his judgment headed "Conclusion", the judge did not ask himself whether the losses claimed were "directly and naturally resulting, in the ordinary course of events, from the breach of warranty" as laid down by the statute. Instead, he asked himself "So, what is the evidence about the nature of the loss that the parties must be taken to have contemplated in the event of a breach in this case?".

22. Section 53(2) does not refer to what the parties must be taken to have contemplated. Nor does Alderson B do so in limb one of his *Hadley v Baxendale* formulation. The question of what the parties must be taken to have contemplated is one that arises only in limb two of the formulation of Alderson B and it is not the primary question. In limiting himself to this question, the judge introduced an element of obscurity into his opinion of the evidence in this case as it bore upon the question of remoteness of damage and causation which was before him.

23. However, I believe it is nevertheless possible to discern the answer to the statutory question from the findings and observations of the judge in various parts of his judgment.

24. The judge found that the Defendant knew that the Claimant was buying the Unit in order to supply it to a client for a freezer room (judgment paragraph 12).

25. The judge accepted the Defendant's evidence "that he was not aware of the nature of the products to be refrigerated or that they were of high value" (judgment paragraph 14). The judge however decided (in paragraph 23), and there is no challenge to this on appeal, that:-

> "…if a refrigeration unit fails, owing to a breach of warranty that the unit is fit for purpose, the natural consequence is that the products requiring refrigeration perish. Awareness that the goods to be refrigerated are of high value is therefore not relevant to whether the damage arises naturally from the breach."

The significance of the alarm facility

26. Had the matter rested there, it is clear that the judge would have found that the loss of the pharmaceutical goods when the refrigeration failed as a result of the breach of warranty was "loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty" (in the words of section 53(2) of the Act).

27. The judge however gave decisive weight to the fact that "the Unit had the facility to be connected to an external alarm or temperature monitoring system" (judgment paragraph 14). He made the following finding of fact (paragraph 15):

> "I am satisfied it was within the contemplation of the parties that C was going to provide the Unit to a client would was going to use it in a 'chiller room' and that if it failed there was an external alarm system built into it."

28. No such alarm system was installed because, as the judge noted, although "AMS was advised by C to deploy the alarm system… AMS did not want to spend the money." (judgment para 15).

29. The judge made no finding about whether that was a reasonable or unreasonable decision on AMS's part. Nor did he make a finding about whether the decision by AMS not to install the optional alarm system took the matter outside "the ordinary course of events" (the language of section 53(2) of the Act). Instead he made a series of findings or observations based upon the somewhat different question he had asked himself about "the nature of the loss that the parties must be taken to have contemplated" (judgment paragraph 35). These findings and observations were in paragraphs 39-42 of the judgment, as follows:-

> "…in light of the evidence that the unit sold by D had the facility to be connected to an external alarm system that C advised AMS to have installed and that they failed to heed the advice, I have to consider what impact this failure has on the extent of the loss that the parties are to be taken to have contemplated.
>
> In my judgment it is difficult to accept that the parties are to be taken to have contemplated that D would be liable to pay damages for breach of warranty under section 53 of the SGA 1979 even though the refrigeration unit D sold included an alarm facility designed to limit the extent of the damage that was not deployed.
>
> I have already held that logically a failure to install an alarm system cannot be a supervening event because it is a failure to do something.
>
> But in my judgment, it is crucial to what the parties must be taken to have contemplated, since otherwise D would have to pay damages in the event of a breach that the Unit he sold was designed to insure against by its alarm facility."

30. The language of these paragraphs ("facility") reflects the fact that it was no part of the case or of the evidence that it was essential that such a facility should be installed. It was an option. Exercising the option had a cost. There was no legal or other requirement for that cost to be incurred. It was a choice open to the customer. The customer in this case, AMS, chose not to add the facility, and thereby saved the optional extra cost.

31. The evidence of the Defendant's expert, Mr Robinson, was that "a monitoring and alarm system which can alert key personnel at all times on process and product critical equipment" is "standard practice in the pharmaceutical and biological manufacturing and distribution industry" but this evidence was not agreed and it was not referred to by the judge. It was evidence limited to a particular industry, and it was key to the Defendant's case that it did not know the business of the customer to whom the Claimant was going to be supplying the Unit. Moreover, to say that it was "standard practice" was not to say that it was an invariable or universal practice even

in the pharmaceutical industry and, indeed, the fact that AMS did not adopt such a practice demonstrated the contrary. Mr Robinson's evidence was also in tension with the evidence of the Defendant's director, Mr Grant, who said in his witness statement (although, again, this is not referred to in the judgement) that "it is regarded as good, if not standard practice" to have either or both of a backup system or "and at the very least" an alarm that calls out an emergency engineer to prevent loss as a result of a breakdown. This was, therefore, evidence that it was not standard practice, but only good practice, to adopt either or both of these safeguards. It is not to be expected that every customer will adopt a good practice, such that the supplier of a defective Unit is spared the consequences of a breach of warranty which such a practice might have mitigated.

32. Not installing the alarm increased the risk. However, it was obvious that the cause of the damage to the pharmaceutical goods was the failure of the component supplied by the Defendant, not the absence of an alarm system that might optionally have been installed to detect that failure. That is recognised in the passage from paragraph 23 of the judgment which I have already quoted: "…if a refrigeration unit fails owing to a breach of warranty that the unit is fit for purpose the natural consequence is that the products requiring refrigeration perish."

33. The judge also decides that the decision not to install an alarm system was not a *novus actus interveniens* breaking the chain of causation when he says, in the penultimate paragraph of the extract from the judgment I have just quoted: "logically a failure to install an alarm system cannot be a supervening event" (paragraph 41).

34. I think, therefore, that if the judge had asked himself the question in section 53(2) – that is, whether the loss of pharmaceutical product suffered by AMS was "loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty" – he would inevitably, as a matter of common sense and consistently with the passages in his judgment I have cited, have concluded that it was. He was, therefore wrong to dismiss the Claimant's claim.

35. If the loss claimed is a loss "directly and naturally resulting, in the ordinary course of events" it is not relevant that it was not foreseen by the party in breach. Section 53(2) of the 1979 Act is in same terms as section 53(2) of its predecessor the Sales of Goods Act 1893, in respect of which Bruce J said in *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 at 736:-

> "…the question I have to determine in this case must be determined by the rule laid down in sub-s. 2 of s. 53; in other words, what is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. The rule so laid down excludes the element of the defendant's knowledge; his liability is to depend, not upon the state of his mind, but upon the facts of the case."

36. Bruce J specifically warned against this important point being overlooked as a result of reference to authorities on limb two of the *Hadley v Baxendale* test (at p 737 of his judgment):-

> "…although there are a vast number of reported cases bearing upon the question of damages for breach of contract, yet most of them have been determined with regard to the damages supposed to have been in contemplation of the parties; and although that matter may still form an important factor in determining whether special damages are due under the second rule in *Hadley v Baxendale* or under s. 54 of the Sale of Goods Act, yet it seems to me that it is an element that has no place in considering the measure of damages laid down in sub-s.2 of s.53."

Special use

37. The Defendant argued that the judge's decision could be defended on the basis in the Respondent's Notice, namely, that "storing high value goods without utilising the alarm system" amounted to "something out of the ordinary" and a "special use" such that the Unit was "not being used in the ordinary course of things". This would take the loss outside the words of section 53(2), which require the loss to be directly and naturally resulting "in the ordinary course of events".

38. In so arguing, however, the Defendant recognises that the judge did not make a finding to that effect and did not put his decision in that way or reach his conclusion by that route. On the contrary, the judge decided that "Awareness that the goods to be refrigerated are of high value is… not relevant to whether the damage arises naturally from the breach" (paragraph 23).

39. I do not agree that the Judge ought to have found that there was a "special use" on the facts of this case. Use of the Unit for refrigeration of goods was not a special use; it was the very thing for which the Unit was designed. It was also (for what it is worth) what the Defendant knew it was to be used for (judgment paragraph 15). The goods required refrigeration; the Unit was designed to supply refrigeration. The "use" was refrigeration. The nature and value of the goods did not change the common use into a special use. All that mattered was that they were goods that needed to be refrigerated and it was the Defendant's defective Unit which, within a matter of months, failed to refrigerate them.

40. I therefore reject the argument in the Respondent's Notice.

41. When the Claimant applied to the judge for permission to appeal, the judge stated when refusing permission:-

> "In the ordinary course of events the probable loss to the buyer of a refrigerator unit with an alarm facility is the loss involving use of the refrigerator with its in alarm facility engaged as it formed an integral part of the quality under the SGA 1979 of the refrigerator unit supplied."

42. This went well beyond anything said in the judgment. There may be a question about whether, once the judge has circulated a judgment and is faced with an application for permission to appeal, he is entitled to modify the judgment. However, leaving that aside, the Unit did not have an alarm, it had the capacity for an alarm to be installed

by others at additional cost and at their option if they chose to do it; which, in the event, they did not. It cannot therefore have been the case that the alarm formed part of the quality of the Unit under section 14 of the Sale of Goods Act 1979. No alarm was being supplied by the Defendant. The Defendant admitted that it was in breach of the section 14 warranty. The judge was not asked to decide, and did not decide, what bearing the absence of an alarm had on that. It was not the Defendant's case, for example, that the Unit was not in breach of section 14 because, although it failed, no harm would have been done if an alarm had been added.

Would an alarm have made a difference?

43. The final point in this appeal is the third of the grounds of appeal set out in paragraph 5 above. This is the point which the judge dealt with in just two sentences, in paragraph 43 of his judgment, as follows:-

> "C argued that there is no evidence that it [i.e. an alarm] would have prevented the damage over the long Bank Holiday weekend. I am afraid I cannot accept that argument since in the normal course of events a refrigerator alarm is designed to prevent or limit damage caused by an increase in temperature."

44. The second sentence does not very clearly address the point being made in the first sentence. The fact that a refrigerator alarm is designed to prevent or limit damage does not mean that, if installed, it would in fact have done so. Whether it would have done so on the facts of this case was a question for the judge to consider on the evidence, and he does not in his second sentence refer to any evidence or challenge the proposition that there was, in fact, no evidence that an alarm would have prevented the damage that occurred.

45. I am told by Counsel for the Defendant that it was put to the Claimant's witness Mr Grant in cross examination, and he accepted, that if an alarm was installed one option was that it might be configured so that a text message or telephone call could be sent to specified telephone numbers. However, Counsel for the Defendant made it clear that he did not go so far as to say this was necessarily the case even if an alarm system was installed. The alarm might simply trigger a light or klaxon on the premises and, since it was common ground that the Unit failed outside working hours and on non-working days, over the course of the long Bank Holiday weekend, such an alarm would have done nothing to prevent the damage which was discovered when staff returned at the end of the holiday. Even if there had been a text or telephone call facility, whether it would have made a difference would have depended on evidence that staff would have been on-call at all hours of day and night, 365 days a year, in order to receive and respond to such messages. It cannot be assumed that every business with refrigerated goods relying on the Unit would have support of that kind, or (specifically) that the Claimant's buyer would have done so, even if their refrigerated goods could not survive without refrigeration. There was also no evidence about how quickly the goods in question would have been damaged by the refrigeration failure. If the damage would have been done before any alarm call was responded to, the alarm would have made no difference.

46. In my judgment, therefore, it was not open to the judge to gloss over the question of whether any alarm, even if installed, would have averted the losses claimed. It does

not appear that there was any evidence to support a finding that the installation of an alarm would have averted the losses claimed and it is certain that the judge did not identify or rely upon any such evidence. Unless it could be shown that an alarm would have made a difference, the presence or absence of an alarm did not entitle the judge to reverse his prior finding that the perishing of the refrigerated goods was "the natural consequence" of the failure of the refrigeration Unit (judgment paragraph 23). It follows that, even if the presence or absence of an alarm might potentially have been relevant to the section 53(2) question (as I have decided it was not), it was not relevant on the facts and the evidence in this case.

Conclusion

47. The appeal will therefore be allowed. The Claimant is entitled to recover the losses claimed and to have the order for costs set aside. I invite the parties to agree an order reflecting the Claimant's success on this appeal, including any consequential matters, such as the costs below and of the appeal.